IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-902

VOLKSWAGENWERK AKTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN PRODUCTS CORPORATION AND VOLKSWAGEN SOUTH CENTRAL DISTRIBUTOR, INC.,

Petitioners,

v.

HEATRANSFER CORPORATION,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1977

No. 77-902

Volkswagenwerk Aktiengesellschaft, Volkswagen of America, Inc., Volkswagen Products Corporation and Volkswagen South Central Distributor, Inc.,

Petitioners,

v.

Heatransfer Corporation,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS RESTATED

1. Whether the petition should be granted to review a jury's fact finding that provisions in the Volkswagen franchise agreements, as *interpreted and enforced,* resulted in *per se* tying violations.

2. Whether the petition should be granted to review a jury's fact findings that the sale of air-conditioners for the various automobiles manufactured by the Volkswagen, Porsche and Audi companies constitutes a relevant market

for purposes of Section 2 and Section 7 analysis when those findings were affirmed in light of all relevant market indicia set forth in *Brown Shoe Co. v. United States.*

3. Whether the petition should be granted to review jury findings of two Section 7 violations based on substantial evidence that the acquisitions in question brought about actual competitive foreclosure with resulting monopoly power.

4. Whether the petition should be granted to review an asserted failing company defense, rejected by the jury, when

(a) none of the elements of the defense was found by the court of appeals to be factually supported, and

(b) the court of appeals rejected petitioners' contention that respondent conceded the existence of such a defense.

5. Whether the petition should be granted to review the claim of conflict with this Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, when, as recognized by the court of appeals, the record is replete with evidence of actual lessening of competition — the missing element in *Brunswick*.

STATEMENT OF THE CASE

The evidence of record on which plaintiff based its case and to which the jury gave credence is well-summarized in the Opinion of the Court of Appeals. The "Statement of Facts" in the petition is correct insofar as it recites the length of trial, the nature of the jury's 15 special verdicts, and the amount of the judgment. Otherwise, it simply reflects an articulation of inferences contrary to those

drawn by the jury and omits critical facts on which the jury was entitled to rely.

A factual overview will serve to reveal how the relevant market came into being and why the antitrust violations occurred. By 1968 more than 500,000 new Volkswagen cars were being sold each year in this country, and in the year preceding trial, 1973, sales of new Volkswagen, Porsche and Audi cars continued at this volume. (DX 857, 862).[1] Throughout this period, millions of vehicles were manufactured and imported without factory air-conditioning because the Volkswagen, Porsche and Audi factories lacked technical capacity. This lack of technical capacity to air-condition cars successfully at the factories was acknowledged emphatically by the highest Volkswagen officials to testify at trial. (A. 3187, 3740). Thus, beginning in the mid-1960's, a clear business opportunity existed for independent manufacturers with the ability to design and sell air-conditioners suited to the design of the Volkswagen, Porsche and Audi cars. Companies came to life whose founders had ideas for the design and sale of these air-conditioners, recognizing a substantial profit opportunity in the endeavor. Respondent, Heatransfer Corporation, was such a company.

In this country, the distribution system into which air-conditioners would be sold consisted of Volkswagen of America, Inc. (VWOA, the exclusive importer for all three vehicle manufacturers), VWOA's independently franchised wholesalers and its independently franchised dealers. VWOA perceived an air-conditioning market developing around the sale of vehicles it imported and, *solely to avail itself of the profit opportunity in that market,* entered an annual contract whereby it purchased and resold to its

[1] "DX" and "PX" references are to defendants' and plaintiffs exhibits. "A" references are to the printed Appendix filed below.

franchisees the entire output of one of the independent manufacturers, Delanair. (A. 1874-75, 3636). The competing manufacturers proved to have superior products, however, and by 1969 VWOA saw its profit opportunity in the sale of air-conditioners slipping away. (A. 3668-69). Rather than permit the air-conditioning needs of its vehicles to be served by innovative competitors with superior products, VWOA acquired control of its previous supplier (Delanair). At the same time, VWOA acquired control of the largest independently franchised wholesaler of air-conditioners for the Volkswagen, Porsche and Audi cars (Intercontinental Motors Corp.). Market control was then secured by additional overt conduct of an anticompetitive nature. (*See* Opinion of Court of Appeals, Petition 23a-24a).[2] VWOA's new air-conditioning subsidiary, Volkswagen Products Corporation (VPC), gained monopoly power, and over the period 1971-73 generated $50 million in gross revenues with $7.5 million in net profits. (A.2239-40, 2592; PX 14, 19-20). Competitors were relegated to the dismal business life of bare subsistence, which is inevitable when a market becomes distorted by the anticompetitive and illegal conduct of a dominant company.

REASONS FOR DENYING THE PETITION

A. The judgment is supported by alternative and independent findings of liability; certain of these findings are not challenged in the petition.

The questions presented by the petition were restated at the outset of this response to reflect respondent's view that this case involves long-established legal principles with an abundance of factual support, rather than "erroneous and expansive rules of liability and damages." As the questions presented indicate, respondent went to trial on alternative theories of liability under Sections 1 and 2 of

[2] Further references to this opinion will simply cite to the petition appendix and page number.

the Sherman Act and Section 7 of the Clayton Act which independently support the judgment below.

In 13 special interrogatories, the jury found, and the courts below affirmed, liability under all statutory theories. (Petition 2a-5a, n.1). In Question 14, the jury was asked whether "such violation or violations" as it had found caused injury to the respondent's business. Petitioners did not object to this manner of submitting the causation issue and requested no alternative form of submission. The jury answered Question 14 in the affirmative and, in answer to Question 15, awarded damages. Thus, the result below has alternative and independent bases for support under Section 1, Section 2 and Section 7. While the court of appeals sustained all statutory bases of liability, it could have sustained the judgment by satisfying itself as to only one of them. The same holds true so far as review by this Court is concerned.

The existence of independently supportive legs for the judgment is especially significant since petitioners present no question for review related to the jury findings that defendants participated in a conspiracy which unreasonably restrained trade in violation of Section 1 (answers to Questions 3, 4 and 5). These conspiracy findings, as noted in the opinion of the court of appeals (Petition 24a), were based on a plethora of evidence showing coordination among the defendants to foreclose competition. The petition fails to address these findings which support the entire judgment.[3]

[3] Petitioners say they do not challenge the jury findings of conspiracy in restraint of trade because the court of appeals affirmed them on the basis of *per se* tying. (Petition 14, n.12). The court of appeals, however, recognized the overall evidence of conspiracy in restraint of trade, of which tying was but one possible

While respondent believes the judgment below can be sustained even if only one group of statutory liability findings is correct, there is no reason in fact, in law or in policy regarding the grant of certiorari to review any of the questions presented.

B. As to the tying offense, neither the legal principles nor the evidence presents an issue for review by this Court. (Response to Question 1 of the Petition).

Volkswagen, Porsche and Audi franchisees are required as a condition of the franchises by which they obtain the automobiles also to purchase and sell air-conditioners "approved" by VWOA, which in this case were the Delanair air-conditioners prior to the acquisition of Delanair and then the VPC air-conditioners. (PX 141, 142). While VWOA argued that its franchisees were "free agents" to purchase from competing suppliers, the evidence made it clear that this "free agency" was illusory. There was evidence that VWOA told all distributors and dealers in a policy statement of their obligation to sell VWOA's air-conditioners and in this same policy statement restricted their purchases of competitive units to situations where the dealer had a "corresponding volume of the genuine and approved item." (PX 22). In a later policy statement, all distributors and dealers were exhorted to carry the VWOA unit exclusively. (PX 638). One recalcitrant distributor was "persuaded" to join the program for the approved air-conditioners after a "short and to the point" conversation. (PX 100, 117). Another major distributor did so after having been put "under considerable pressure," which consisted of numerous concerted calls to the distributor

example, and in no way disturbed the findings. (Petition 24a, 45a). These findings of unreasonable restraint of trade remain. *See Fortner Enterprises Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 499-500 (1969) (tying is also subject to rule of reason analysis).

telling him that he had to order the VPC air-conditioner and bring his inventory to the "necessary level." (PX 264, A. 3717). As the ultimate enforcement tool, defendants began to put the approved air-conditioners on the vehicles at port facilities in advance of receiving orders from the dealers specifying whether they wanted cars with or without air-conditioners: "[Y]ou order a bunch of particular type cars over there and they say they all got air-conditioners on them. . . . And if we wanted cars we took them." (A. 2930) (*See generally* Petition 23a).

The trial court found sufficient evidence of the threshold criteria for tying (economic power over the tying product and a not insubstantial amount of commerce in the tied product) and sufficient evidence of actual tying to submit the question to a jury. The court of appeals sustained the finding, quoting the trial court's charge which clearly and correctly set forth all of the elements of a tying offense and as to which no complaint was made on appeal. (Petition 22a, n. 12).

Petitioners say that this case makes *per se* tying violations out of "best efforts" clauses which are contained in "almost all" franchise agreements and that the effect of such a holding will be devastating for the franchise industry.[4] The court of appeals explicitly said that it was not holding all "best efforts" clauses to be *per se* tying violations (Petition 23a) and explicitly rejected the argument that the jury finding, taken in light of the charge, was based

[4] There is no record evidence regarding provisions in franchise agreements other than those in franchises for Volkswagen, Porsche and Audi vehicles. Curiously, the cases cited in the petition (page 11, n. 8) for the "almost all" proposition were decided under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221 *et seq.*, one of the principal purposes of which was to prevent automobile manufacturers from forcing unneeded or unwanted parts and accessories on dealers. *E.g.*, *Volkswagen Interamericana S.A. v. Rohlsen*, 360 F.2d 437, 442 (1st Cir.), *cert. denied*, 385 U.S. 919 (1966).

on the franchise provisions standing alone (Petition 20a). The trial court clearly explained the concept of tying two products together and instructed the jury that power over the tying product "must have been used to force the purchase of some unwanted product." (Petition 21a, n. 12). Thus, the jury was required to find not only tying arrangements but also enforcement of those arrangements in order to answer the interrogatory as it did.

Finally, petitioners assert that the court of appeals created a new evidentiary standard for competing suppliers with regard to tying. It is difficult to see how this can be said in light of the following operative language from the opinion (Petition 22a):

> If franchisees are coerced or 'persuaded' to buy goods which they otherwise would not buy, with the result being tremendous lessening of the market in which a competitor sells his product, such a showing is sufficient to submit the question of a Section 1 antitrust violation to the jury.[5]

C. Petitioners' relevant market argument assumes that Brown Shoe Co. v. United States and the relevant market criteria set forth therein do not exist. (Response to Question 2 of Petition).

The jury found for purposes of Section 2 and Section 7 the relevant market to consist of the sale of air-conditioners for Volkswagen, Porsche and Audi vehicles. The evidence showed that within the universe of automobile air-conditioning there were (1) domestic automobile manufacturers who design units specially for their cars and install them at the factories; (2) independent manufacturers, some of whom produce a fairly wide variety of units for more conventional cars with water-cooled engines

[5] With respect to the evidentiary requirement of "coercion" in tying cases, *see FTC* v. *Texaco, Inc.*, 393 U.S. 223, 230 (1968); *Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1221 n.7a (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

but most of whom have not continued to be successful (A. 1747-49, 2885-87); and (3) specialized vendors selling air-conditioners for the Volkswagen-Porsche-Audi line of cars. (A. 4409-22). The Volkswagen-Porsche-Audi air-conditioning business was shown by respondent to be distinct and separable from the other two categories because (a) the absence of factory installation and the large number of Volkswagen, Porsche and Audi cars being sold created a distinctly large potential air-conditioning business; (b) consequently, vendors able to design units successfully were attracted to the Volkswagen business on a specialized basis; (c) there was a substantial distributor-dealer network representing a distinct set of customers in that it had air-conditioning demand for the Volkswagen-Porsche-Audi line of cars and for no others; and (d) design characteristics of these cars required a distinctive design approach to air-conditioning which prevented non-specialized vendors from successfully developing units. (Petition 26a-27a). In addition, it was shown that in the judgment of VPC, air-conditioner sales were not sensitive to the prices of air-conditioners for other cars. Therefore, when requested by distributors to reduce prices on air-conditioners in order to make the overall car price more competitive with prices for other kinds of air-conditioned cars, VPC refused on the ground that a price reduction would not increase the volume of its air-conditioner sales. (A. 2806, 2481-89). Petitioners' contention that the relevant market consisted of the sale of air-conditioners for all cars or all small cars was a bald assertion which could have no weight in the face of concrete and extensive evidence supporting respondent's view of the market.

Brown Shoe Co. v. *United States*, 370 U.S. 294, 325 (1962), established that relevant market is to be determined by examining all factual indicia. Petitioners seek review

on the basis of one index — production flexibility —in isolation. Petitioners' narrow view is explained by the fact that, when all was said and done, their only evidence on relevant market related to the theoretical ability of a manufacturer to convert his facilities from the making of air-conditioners for one type of automobile to another. The trial court instructed the jury that they should consider production flexibility in making their relevant market determination. No court has held the existence of production flexibility to be dispositive as a matter of law. *See Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674, 691 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).[6]

The cases cited by petitioners from the Supreme Court, Ninth and Tenth Circuits (Petition 15-16) as being in conflict with the relevant market determination in this case

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[6] Moreover, such a ruling would be unfathomable in a case where the record proved that production flexibility never existed as a practical matter. The evidence in fact showed that numerous manufacturers of air-conditioners for other types of cars had tried unsuccessfully to design units for the Volkswagen line of cars that would work properly and could be sold, and that manufacturers successful in the design of units for the Volkswagen line of cars historically had specialized and did not attempt to move into other lines. Production flexibility was purely theoretical because in the automobile air-conditioning business there is absolutely no flexibility or interchangeability at the buyer level where a distributor or dealer who sells a particular line of cars has absolutely no demand for and cannot use air-conditioners designed and made to fit other types of cars.

It is well-established that analysis of the market from the buyer level is essential. *See e.g., United States* v. *Aluminum Co. of America,* 377 U.S. 271, 275 n. 3 (1964); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 508 F.2d 547, 551 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); *L. G. Balfour Co.* v. *FTC,* 442 F.2d 1, 11 (7th Cir. 1972); *Reynolds Metal Co.* v. *FTC,* 309 F.2d 223, 227 n. 5 (D.C. Cir. 1962); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 592 (S.D.N.Y. 1958).

are not in conflict.[7] Those cases involved apparent flexibility or interchangeability at the seller and buyer levels, whereas such interchangeability at the seller and buyer levels did not exist as a factual matter in this case.[8] More essentially, there is obviously no conflict in legal principle between those cases and this case. Relevant market has been universally recognized as being a question of fact heavily dependent on the characteristics of the particular industry involved. *See Sulmeyer* v. *Coca-Cola Co.,* 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).

Petitioners also argue that even assuming the correctness of market definition, the finding of monopoly power was improper because of the existence of interbrand competition in the sale of automobiles. The jury was instructed that monopoly power was the power to control prices and exclude competitors, which could be inferred to some extent from market share. In addition to a market share of approximately 75%, VPC was demonstrated to have the ability to exclude competition and to control price over the sale of air-conditioners for Volkswagen, Porsche and Audi cars. Petitioners argued for and received instructions to suggest that the relevant market might be the sale of air-conditioners for all cars or all small cars but never requested an instruction that the jury consider interbrand

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[7] In asserting that the decision in this case is in conflict with decisions of the Ninth Circuit, petitioners neglect to note that in *Calnetics Corp.* v. *Volkswagen of America, Inc., supra,* that court, in a case involving Volkswagen air-conditioners, cited with approval the district court's treatment of production flexibility in this case. 532 F.2d at 691 n.29.

[8] Thus, the alleged "conflict" with the Tenth Circuit is not a difference in law. Production flexibility was a factual reality in the case before that court and was not here. *Compare Telex Corp.* v. *International Business Machines Corp.,* 510 F.2d 894, 912 n. 11 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975) *with* Petition 26a-28a.

competition in the sale of vehicles in determining the existence of monopoly power. (A. 552-54). In any event, the argument is a complete *non sequitur* unless the concept of monopoly power is to be limited to only a few basic industries.[9] It would make as much sense for petitioners to say that competition in the sale of automobiles negates the possibility of monopoly power in the sale of tires by independent manufacturers or that competition in the production of crude oil negates the possibility of monopoly power in the sale of oil field equipment to producers. The cases cited in the petition pertaining to the relationship between interbrand and intrabrand competition involved the same product market and have no application to a case where different product markets — air-conditioners and automobiles — are involved.

D. The Section 7 findings were supported by substantial evidence of competitive foreclosure, and there was a complete absence of evidence to support the failing company defense. (Response to Questions 3, 4(a) and 4(b) of the Petition).

The wording of the questions presented suggests petitioners' belief that the corporate acquisitions in issue could not have been unlawful because they involved a "captive supplier" on the one hand and a "wholesale distributor" on the other. Since all corporate acquisitions which substantially lessen competition in a relevant market in the United States are subject to the proscription of the statute, these generic descriptions are meaningless. The court of appeals held that the evidence taken as a whole was sufficient to sustain the findings of a substantial foreclosure of competition in violation of Section 7. (Petition 29a-31a).

[9] *See Associated Press* v. *United States*, 326 U.S. 1, 17 (1945); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 425-26 (2d Cir. 1945).

The evidence showed that these contemporaneous acquisitions enabled the application of economic force on the distribution system by VWOA, causing the trend in market shares substantially favoring competitors of Delanair immediately prior to the acquisitions to be reversed immediately thereafter. (Petition 31a). Petitioners' claim at trial and here of improved market share because of improved product is futile; the evidence showed that the reversal in market share trend was accomplished before VPC made any product improvement. Delanair units which had been virtually unsaleable prior to the acquisition (called "rubbish" by one Delanair executive) suddenly became eminently saleable in the hands of VWOA's new subsidiary VPC. (PX 7-8, A. 3262-67, 3517-18). The reversal in market share trend was perpetuated from 1969 through 1973 with VPC gaining monopoly power and the competitors substantially foreclosed.[10]

In light of the relevant market findings, the market share evidence before and after the acquisitions, and the methods underlying the reversal in market share trend (which had nothing to do with product or management improvement),

[10] Some of the market share data is set forth in the petition at page 7. There was additional evidence showing VPC with even higher shares. (PX 9-10; A. 2233-38, 2241-42). Petitioners suggest that the fact that VPC never attained the highest market share held by Delanair is evidence that the acquisition did not injure competition. (Petition 19, n.20). However, petitioners ignore the prime reason why DPD, one of the competitors, was able to arrest its decline. In 1971, DPD filed an antitrust suit against VWOA, concluded by a settlement agreement dated November 24, 1971 (referred to at trial as an "agreement"). In that agreement, VWOA agreed, *inter alia*, to guarantee the sale of 3,600 DPD units in 1972, to insert DPD catalog sheets in the VWOA catalog, to give DPD advance technical information, and to use its best efforts to have all VW distributors amend their order forms so that dealers could order DPD units through distributors. (PX 391). The import of this evidence was that VWOA reluctantly agreed to share the market it had foreclosed by its acquisition of Delanair.

the conclusion that these acquisitions substantially lessened competition was inescapable. In line with *Ford Motor Co. v. United States,* 405 U.S. 562 (1972), these vertical acquisitions restricted the customer market for independent suppliers by eliminating VWOA and the wholesale distributor as major potential customers for anyone other than VPC, and by giving VPC distinct advantage with respect to the other distributors and dealers. Despite petitioners' contention that VWOA was foreclosed to other competitors even prior to the acquisition, a VWOA executive admitted in his testimony that Delanair's continued poor performance would have required VWOA to turn to other suppliers absent the acquisition. (A. 3764).

Petitioners' contention that this case conflicts with *United States* v. *General Dynamics Corp.,* 415 U.S. 486 (1974), is based on a misconception of the two cases. In *General Dynamics,* it was held that a horizontal merger should not be judged solely on the basis of pre-acquisition market shares, but rather on the probable future effects on competition where the acquired company's limited reserves suggested it would be a declining factor. In this vertical merger case, post-acquisition market data compared with pre-acquisition data demonstrated that the foreclosure of competitors by reason of the acquisitions was not only possible but in fact occurred. Further, in a horizontal merger, the principal concern is that the combined strength of the merger partners will produce anticompetitive effects. When the acquired firm is weaker than its market share indicates, the probability of this effect is lessened. On the other hand, the lessening of competition in a vertical merger occurs because competitors at the supplier level are foreclosed from a customer market for their products. The pre-acquisition strength of the acquired supplier is irrelevant where, after the acquisition, the acquiring customer forecloses other suppliers and uses its economic

power to force the acquired supplier's products on other customers.

At trial, defendants' principal thrust with regard to the Delanair acquisition as a Section 7 violation was the failing company defense. The trial court's charge on failing company was given in the language of this Court in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969). In sustaining the jury's rejection of this defense, the court of appeals found insufficient evidence to satisfy any element of the defense. (Petition 31a-32a). Not only was reorganization in bankruptcy never even considered by Delanair, but there was (a) "nothing in the record that supports the theory that Delanair would collapse but for the acquisition" and (b) no evidence of "affirmative effort to sell Delanair on the open market" to a purchaser less anticompetitive than VWOA. (Petition 32a).

Realizing that their evidence is woefully inadequate to justify this Court's review of a failing company defense, petitioners assert that plaintiff conceded Delanair to be a failing company at the time of acquisition. The court of appeals properly held that "appellee did not argue, nor did it prove, that Delanair was a failing company." (Petition 39a). Plaintiff offered no testimony on Delanair's lack of profitability at the point of acquisition or on its prospects for financial survival in the future; it had no witness with any knowledge of this subject. Respondent did offer in evidence a damage model which captured the various competitors' sales trends in volume of units prior to the acquisition and projected those trends into the damage period, 1969 through 1973. This damage model showed declining sales by Delanair over the period 1969-73 because that was the trend established prior to the impact of unlawful conduct. If this damage model had assumed Delanair to be out of existence, to have no sales, at the

time of acquisition, petitioners could perhaps argue the failing company defense to have been conceded and thus urge the question not reached by this Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484 n. 9 (1977). However, no such assumption was made in the damage model; rather, Delanair was assumed to have sales continuing throughout the damage period. In fact, the damage model assumed that in 1973, the last year of the damage period, Delanair would have sold 5,513 air-conditioning units, more than Heatransfer ever actually sold in one year.

Whatever the merits of the question not reached in *Brunswick,* that question cannot be resolved in this case where the non-existence of the acquired company at the point of acquisition was neither conceded nor hypothesized.

E. The decision in this case is in full accord with Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (Response to Question 4(c) of the Petition).

A question recurring over the years has been whether Section 7 of the Clayton Act could support a private damage recovery when that statute predicates liability on a probable future lessening of competition as a result of a merger, whereas a private damage recovery requires present actual damages. The answer in *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967) and in *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.,* 507 F.2d 959 (8th Cir. 1974) was that private damage recovery can be obtained under Section 7 where the plaintiff shows not only that an acquisition may lessen competition in the future but that it has in fact lessened competition and caused damages. Plaintiff's position in this case from its earliest trial briefs was that it would show a right to damages under Section 7, *inter alia,* by showing that the two acquisitions in question caused an impermissible lessening of

competition in the marketplace over the period 1969-73, and that Heatransfer was one of the direct victims of this anticompetitive impact on the market.

In *Brunswick,* the plaintiffs contended that the acquisition of certain bowling alleys was illegal because the acquirer *might* use its "deep pocket" to engage in predatory practices, although there was no evidence that this had in fact occurred. 429 U.S. at 481-82, 490. Liability was predicated on a probable lessening of competition. In order to show damages, the plaintiff assumed that the bowling alleys in question would have ceased to exist but for the acquisitions, the acquisitions thereby denying plaintiffs business they would have had if the competing alleys had gone out of existence. *Id.* at 488.

This Court held that while the plaintiffs' losses occurred "by reason of" the unlawful acquisitions, *i.e.*, would not have occurred had the unlawful acquisitions not been made, these losses did not occur "by reason of" that which made the acquisitions unlawful. In other words, the mere fact of an unlawful acquisition or "mere presence" of an illegal acquirer in the market is not sufficient in itself for damages; rather, it must be shown that the illegal acquirer caused an antitrust injury to the competitive system of the type the antitrust laws were designed to prohibit and that damages flowed therefrom. In several different ways, the Court said that ideally there must be shown an actual anticompetitive impact from the acquisition in the relevant market resulting in damages to the plaintiff. *Id.* at 488-89. A concluding footnote delineates the distinction between *Brunswick* and this case:

> This does not necessarily mean, as the Court of Appeals feared, 523 F.2d. at 272, that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short term effect of certain anti-

> competitive behavior — predatory below-cost pricing, for example — may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. *Of course, the case for relief will be strongest where competition has been diminished. See, e.g., Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (CA9 1976)* ....

Id. at 489 n.14 (emphasis added).

This citation to *Calnetics* (a related case in which another air-conditioning competitor made the same allegations as Heatransfer regarding the Delanair acquisition and in which the Ninth Circuit remanded on the ground that the plaintiff had been erroneously denied a jury trial on its Section 7 damage claims) puts to rest any contention that *Brunswick* and the present case are alike. As stated in the Opinion of the Court of Appeals, Heatransfer proved much more than the fact of an unlawful acquisition or the "mere presence" of an antitrust violator in the market. (Petition 36a-38a). It proved that the acquisition of Delanair and the other challenged acquisition had exactly the anticompetitive effects of vertical integration that such acquisitions might be predicted to have: foreclosure of competition and of competing suppliers like Heatransfer. *See, e.g., Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 323-24. It was shown that the monopolistic character of the market was made possible, *inter alia,* through conspiracies in restraint of trade and predatory practices following the acquisitions. In short, the proof of injury to competition lacking in *Brunswick* was presented in full force.

Petitioners' contention that the damage model in this case, because it assumes declining sales by Delanair, is inconsistent with the holding in *Brunswick* is fundamentally wrong. *Brunswick* dealt with the type of injury that must be shown under Section 4 of the Clayton Act, 15 U.S.C.

§ 15, and did not purport to overrule any of this Court's decisions dealing with the method of quantifying injury, once proved. *E.g., Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 263-66 (1946). This Court did not reject the damage proof because it was improper to quantify damages based on the acquired firms ceasing to exist (that was the question of a conceded failing company not reached by the Court). Instead, the proof was held infirm because the damages quantified were based on the mere fact of the acquisitions with no showing of "antitrust injury" resulting therefrom.

Brunswick's missing element, injury to competition, almost necessarily put the damage proof at odds with the purposes of the antitrust laws. The incongruous result was a damage model postulating reduced competition and increased concentration but for the acquisitions. Damages in the present case, on the other hand, were predicated on a showing that the alleged violations reduced competition, resulted in a monopoly, and foreclosed competitors from the market. The damage model projected what might have taken place if competition had not been diminished and competitors foreclosed on the basis of what had taken place prior to the full impact of the violations.[11]

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[11] Heatransfer quantified its injury of foreclosure by constructing a model projecting into the damage period the state of competition prior to unlawful impact. The damage model postulated was not a monopoly (as actually existed over the period 1969-75), but a market in which the shares of the participating competitors were consistent with the existence of competition. Heatransfer was projected to be not the leading seller but the second leading seller with approximately a 30% share. It was accorded a greater share and hence volume of sales than Delanair because the evidence showed that Heatransfer and the other competitors had beaten Delanair in fair competition and proved their products to be superior prior to being foreclosed. Yet Heatransfer was not accorded Delanair's monopoly. Delanair's sales were projected as declining in the damage model because that was Delanair's trend prior to the impact of unlawful conduct.

Heatransfer's damage model followed logically from its proof of injury to competition. After showing injury to competition from the unlawful acquisitions, Heatransfer postulated on the basis of pre-impact evidence that if the market had been competitive, it would have outperformed Delanair. There is nothing incongruous with the antitrust laws in this construction, and there is accordingly no flaw in the damage model under *Brunswick*.

CONCLUSION

This case was correctly decided on the facts and law in the lower courts. The questions presented by the petition, taken individually or as a whole, provide no basis for the

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In attacking the method of quantification in this case, petitioners make the startling suggestion that the damage model should have "demonstrate[d] what its [Heatransfer's] sales would have been had the Heatransfer unit been bought and resold by Volkswagen." (Petition 24). Such a model would presumably have required an assumption that Heatransfer's market share during the damage period would have been the same as Delanair's, which at times exceeded 80%. (Petition 7). This assumption would have resulted in a greater damage figure than the damage model actually used, which assumed that Heatransfer's market share would never exceed 30%.

Petitioners' argument above shows the difficulty of constructing damages in any way other than respondent constructed them. Since it was completely foreclosed by unlawful conduct, Heatransfer could only project on the basis of its performance in a relatively competitive market prior to impact. Having been illegally frozen out of the market, Heatransfer ~~was un~~willing to assume, for example, that any of its losses were caused by alleged product improvements thereafter made by petitioners. The alleged product and service improvements were never put to the "acid test" of competition. Petitioners, however, made the argument that VPC sales increases were due solely to product and service improvements, unrelated to any unlawful conduct, and the jury was instructed to test the damage model against all the evidence. The jury could have accepted petitioners' "product improvements" argument in whole or in part but apparently did not. The damage model was reviewed extensively by the lower courts. (Petition 33a-45a).

exercise of this Court's powers of review, and the petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify the service of the foregoing was made on January 19, 1978, by depositing three copies of same in the United States mails, First Class Postage Prepaid, addressed to: Richard A. Posner, 1222 East 56th Street, Chicago, Illinois 60637.

/s/ C. Brien Dillon